Supreme Court, U.S.
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No. 98-1498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NAUMAN S. SCOTT, U.S. DISTRICT JUDGE,

Petitioner,

v.

MICHAEL P. TONE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT W. GLENN BURNS

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PARTIES TO THE PROCEEDING

Petitioner certifies the following list of parties to the proceeding in the Court of Appeals:

Larry D. Crowe (deceased)
Estate of Larry D. Crowe
Sue Ellen Crowe Silman
Succession of Reba Coody Crowe
Robert B. Bieck, Jr.
Attorneys' Liability Assurance Society, Inc.
Michael P. Tone
Anne Fielder
James W. Berry
William E. Wright, Jr.
Judy L. Burnthorn
W. Glenn Burns
American Casualty Company of Reading, PA
CNA
Judge Nauman S. Scott

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STATEMENT OF THE CASE

These sanction proceedings grew out of a civil RICO action brought by Larry D. Crowe, et al. ("Crowe") against his former partner, the directors of a defunct savings and loan and its former attorneys. Crowe alleged that those parties had, in various ways, cheated him out of his interest in certain real estate. This RICO action which ultimately gave its name to these proceedings, was tried before the Honorable Nauman S. Scott, District Judge of the Western District of Louisiana. In the underlying RICO case, W. Glenn Burns was employed by the malpractice carriers of certain lawyers who could have had only *respondeat superior* liability for any alleged improper conduct of two of their former partners. The remaining Defendants were represented by other counsel. Because he had not been involved in the actual litigation to any depth, Burns was completely unaware of the potential for any directors and officers ("D & O") insurance of the long-ago failed savings and loan association. His focus was attempting to settle on behalf of his insured lawyers using funds provided by their malpractice carriers.

On the night before trial, July 11, 1994, he met, in the company of other defense attorneys, with Mr. Joe Ward, the Crowes' counsel. They debated the amount of potential coverage afforded the lawyers by their malpractice carriers. Mr. Ward, on behalf of the Crowes, sought a settlement of $6.2 million. Speaking only of the malpractice insurance of his clients, Mr. Burns responded that such an offer was "completely beyond any theory of coverage in this case".

In subsequent sanction proceedings, Judge Scott found that Mr. Burns' response was misleading to the Plaintiffs' counsel since it did not include potential coverage from any

D & O policy. Though the Fifth Circuit reversed Judge Scott's sanctions against Mr. Burns, it remanded the issue of Mr. Burns' and others' actions at the July 11, 1994 meeting.

Mr. Burns has filed a Petition for Writ of Certiorari in this Court (Number 98-1470) suggesting that the sanction judgment against him should have been reversed and rendered rather than reversed and remanded in part. However, Judge Scott has also filed a Petition for Writ of Certiorari herein (Number 98-1498) seeking review of the Fifth Circuit's decision reversing his sanction judgment against the majority of the Defendants, including Glenn Burns.

A. The Petition Misrepresents A Material Fact. It Suggests That Joe Ward, The Crowes' Counsel, And Later The Court's Counsel, Was Mislead At A July 11, 1994 Settlement Meeting.

In Judge Scott's Petition for Writ of Certiorari, Burns believes that, at page 9 thereof, there is an exceptional misstatement of fact by Judge Scott's counsel:

> Another attorney, W. Glenn Burns ("Burns"), told the Plaintiffs that their demand for $6.2 million was beyond all possible theories of insurance coverage — even though the amount of insurance exceeded $7 million, counting the CNA policy. Although the other defense attorneys present at this meeting knew that *the statement was incorrect*, no one advised the Plaintiffs of the truth.

(Emphasis added.)

This important misstatement of fact goes to the very heart of why Burns is aggrieved by the Trial Court's remand of this alleged fact issue to the Trial Court. It is particularly egregious since it is overwhelmingly *contradicted by Mr. Ward's own testimony* at trial:

During the trial of the sanctions proceeding, he was questioned about the meeting:

> Q. In that regard, when you were talking earlier and in your earlier testimony indicated that Mr. Burns had said to you that your $6 million offer, I believe it was, was beyond any theory of coverage or words to that effect —
>
> A. I had initially thought that Mr. Wright made that statement to me, but Mr. Burns has corrected me, that he made that statement. And in his defense, *Mr. Burns added that he was referring to the error and omissions coverage. And I agree with that statement*, that $6 million was outside any possible errors and omissions coverage.

(Emphasis added.) R. 5051 Ward: 12-4-95 Trans., at p. 68.

. . .

> So when we got in there and I brought up coverage, Glenn apparently — and I thought, it was Bill and I apologize for saying it was Bill if it wasn't. Glenn apparently said, Joe, your demand is outside all possible coverage. *Glenn maintains he is now talking about the errors and omissions coverage,*

> *which is all I thought*. And it was, because I had broken it down $4 million for Smith and $2 million for the attorneys. And Glenn is saying, well, $6 million, Joe, we might as well go home. And this was horse trading. And I wouldn't expect them to say we got "X" million dollars, it's on the table. We have to be honest about that. I know there is some horse trading that goes on there. I negotiate as a defense lawyer all the time.

(Emphasis added.) R. 5051 Ward: 12-4-95 Trans., p. 207.

. . .

> Q. And during the course of those discussions, as I take it from these proceedings, there is no allegation that he was anything other than forthright with you about what coverages existed and talked to you at length about that?
>
> A. I believe that's a very accurate statement. I don't believe Glenn Burns and I — *I don't believe he misled me at all about that*. We were very open . . .

(Emphasis added.) R. 5051 Ward: 12-4-95 Trans., p. 209.

Referring to the events of the July 11, 1994 meeting, Bill Wright, another defense lawyer who was present, corroborated the testimony of Burns and Ward. He testified:

> Q. And were there any policies that you understood were being addressed other than Home and New England?

A. No.

Q. Was there any discussion that night with Ward or McDowell about the directors?

A. No.

Q. Was there any discussion that night about any directors or officers coverage of any kind?

A. No.

Q. Was there any question by Mr. Ward or McDowell in your presence that evening whether there was any coverage arguably or conceivable or possibly available other than Home and New England?

A. Absolutely not.

R. 5090 2-12-96 Trans., pp. 66-67).

Again, the Court's own counsel, Mr. Ward, agrees that Burns was only discussing the malpractice policies, that he understood the subject of the conversation and was not deceived by it.

A. . . . Mr. Burns also, in a meeting of counsel when I asked about coverage, — believe he made a statement that my demand of $6,290,000 was outside any possible coverage. *But I don't believe that Mr. Burns knew there was a $5 million D & O Policy out there.*

(Emphasis added.) Ward: 12-4-95, Trans., pp. 66-10.

. . .

> A. . . . We discussed extensively the coverages that the E & 0 carriers provided, and Mr. Burns and I were of a mind that it was a difficult coverage question. [Ward: 12-4-95, 67-24] . . . So we had a law school type question on the E & 0 question, and *I think he addressed himself to that and not the D & 0 coverage with CNA.*

(Emphasis added.) Ward: 12-4-45 Trans., p. 68.

B. Judge Scott's Petition Should Be Denied Insofar As It Seeks To Reinstate Sanctions Against W. Glenn Burns.

Judge Scott's argument in favor of imposing sanctions upon W. Glenn Burns for his comments to the Crowes' counsel at the July 11, 1994 meeting are premised upon the suggestion that Mr. Crowes' counsel was intentionally mislead by those comments. As it dramatically appears from Mr. Ward's own sworn testimony at trial, he *admits* that he was not mislead and that he and Mr. Burns both understood that the coverage issue being discussed referred *only* to the errors and omissions polices of the lawyers represented by Mr. Burns.

These sworn admissions by the Crowes' counsel, who later acted as counsel to Judge Scott, not only indicate that the Petition for Writ of Certiorari of Judge Scott (insofar as it effects Mr. Burns) should be denied, but also argues forcefully in favor of Mr. Burns' Petition for Writ of Certiorari asking that the imposition of sanctions against him, particularly as they arose out of the July 11, 1994 meeting,

should not only be reversed, as the Fifth Circuit decreed, but that the sanctions against him should be *dismissed* and judgment *rendered*. Based upon Mr. Ward's own testimony, there is absolutely no reason whatever to remand the matter for further consideration in the Trial Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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